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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934—NO. 546.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

—against—

THE CITY OF NEW YORK, and others,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR RESPONDENT CORN EXCHANGE BANK.

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THE COURT PRESS, N. Y. C.

INDEX

Page

Statement of the Case 1

Summary of Argument 4

Argument:

POINT I—The so-called easements or rights of the claimants to impair the easements of light, air and access of the abutting owners which were acquired for, and appertained only, to the operation of the Spur were extinguished upon the removal of the Spur, which was judicially determined to be not only no longer necessary and convenient for the public service, but an impediment and obstruction to the public use of the street, and any rights the claimants had to impair or encumber the abutting property owners' easements of light, air and access upon the removal of the Spur reverted to the said property owners who then held their easements of light, air and access in their full integrity, unimpaired and unencumbered by any easements or rights of the claimants, and claimants having received an award of $539,117.41 for the alleged "taking" of their so-called easements, are not aggrieved by the judgment of the Court below, for we submit that there is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements 7

TABLE OF CASES CITED:

Atl. & W. C. R. Co. v. *Way, et al.*, 172 N. C. 774, 90 S. E. 937..... 18

Auchincloss v. *Met. El. R. Co.*, 69 App. Div. 63..... 9

Bell v. *Mattoon Water Works etc. Co.*, 245 Ill. 544, 19 Ann. Cas. 133 13

Bohm et al. v. *M. E. R. Co. et al.*, 129 N. Y. 576..... 10

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189..... 21

Brooklyn, Queens Co. et al. v. *Bird*, 76 Misc. 62, aff'd 152 App. Div. 932 13

Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106, at p. 123..... 24

California & N. R. Co. v. *McCartney*, 104 Cal. 616, 38 Pac. 448..... 18

C. B. & Q. Railway Co. v. *Drainage Comm'rs*, 200 U. S. 561..... 11, 12

Central Wharf v. *Indian Wharf*, 123 Mass. 567..... 18

Chicago & N. Y. Ry. Co. v. *Sioux City Stockyards*, 176 Iowa 659, 158 N. W. 769..... 18

Chrisman v. *Miller*, 197 U. S. 313, at p. 319..... 8

Clarion Turnpike & Bridge Co. v. *Clarion County*, 172 Pa. 243, 33 Atl. 580 9

Consolidated Gas Co. v. *City of New York*, 157 Fed. 849..... 17

Crouch v. *State of New York*, 218 App. Div. 356..... 13, 15

Gleason v. *White*, 199 U. S. 54, at p. 60..... 8

	Page
Grafton v. *Moir*, 130 N. Y. 465, at p. 470	18
Great Northern Ry. Co. v. *Donaldson*, 246 U. S. 121, at p. 124	8
Harris, et al. v. *Elliot*, 10 Peters (U. S.) 25, at pp. 55 and 56	13
Heard v. *City of Brooklyn*, 60 N. Y. 242	13, 14
In re Elevated Railroad Structures in Forty Second St., City of New York, 265 N. Y. at pp. 170, 180, 182; 141 Misc. at p. 572; 238 App. Div. 832; 126 Misc. at p. 895; 229 App. Div. at pp. 627-629; 229 App. Div. at p. 620	3, 8, 11, 13
In re Oak Leaf Coal Co., 225 Fed. 126	18
Jacobs v. *United States*, 290 U. S. 13	22
Kennebec Water Dist. v. *City of Waterville*, 97 Me. 185, 54 Atl. 6	9
Kernochan v. *N. Y. E. R. R. Co. et al.*, 128 N. Y. 559	10
Knoth v. *Manhattan Ry. Co.*, 187 N. Y. 243	9
Lahr v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, at p. 288	11
Mayor, etc. of New York v. *M. R. Co.*, 143 N. Y. 1, at pp. 31-33	1
Monongahela Navigat'n Co. v. *United States*, 148 U. S. 312	9, 22
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89, at p. 94	11
Newman v. *M. E. R. Co.*, 118 N. Y. 618	10
Northern Pac. Ry. Co. v. *N. American Tel. Co.*, 230 Fed. (C. C. A. 8th Cir.) 347, at p. 352	9
Olson v. *United States*, 292 U. S. 246, 255	22, 23, 24
Omnia Commercial Co. Inc. v. *United States*, 261 U. S. 502	11, 12
Oshkosh Water Works Co. v. *Railroad Commission*, 161 Wisc. 122, 152 N. W. 859	9
Puget Sound Co. v. *Seattle*, 291 U. S. 619	11, 12
Rothschild v. *Interborough Rapid Transit Co.*, 162 App. Div. 532	9
Scheer v. *L. I. R. R. Co.*, 127 App. Div. 267	13
Southern Ry. Co. v. *City of Memphis*, 97 Fed. (C. C. A., 6th Cir.) 819	18, 19, 20
Story v. *N. Y. Elevated R. R. Co.*, 90 N. Y. 122	11
Strong, et al. v. *City of Brooklyn*, 68 N. Y. 1	13, 14
United Railroad v. *San Francisco*, 239 Fed. 987, 997	12
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	12, 21, 22, 23
United States v. *New River Collieries Co.*, 262 U. S. 341, at p. 344	22
United States v. *Rogers*, 255 U. S. 163, at p. 169	22
Vogelstein & Co. v. *United States*, 262 U. S. 337, at p. 340	22
Wash. Cemetery v. *P. P. & C. I. R. R. Co.*, 68 N. Y. 591	13

OTHER AUTHORITIES CITED:

Rapid Transit Act of 1875 (Laws 1875, Ch. 606)	1, 13, 21
19 C. J. 954, Sec. 172	18
9 R. C. L., p. 815	18

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—against—

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Respondents.

BRIEF FOR RESPONDENT CORN EXCHANGE BANK.

Statement of the Case.

It will, in view of the briefs filed by the other respondents, be unnecessary for us to give any detailed statement of facts. We shall confine ourselves, for the most part, to the facts particularly applicable to this respondent and to those upon which our argument hereinafter made is principally predicated.

The Manhattan Railway Co. and the Interborough Rapid Transit Company will hereinafter be referred to respectively as "Manhattan Co." and "Interborough Co."

The right or franchise of the Manhattan Co. to operate the Third Avenue Line and the 42nd Street Spur is predicated on the provisions of the Rapid Transit Act of 1875 (Laws 1875, Ch. 606—*Mayor, etc. of New York* v. *M. R. Co.*, 143 N. Y. 1 at pp. 31-33). Pertinent provisions of said statute are set forth as Appendix "C" in the brief of the other property owners from which it will be noted that all that

the railway company could acquire by conveyance, condemnation and prescription was the right to impair the easements of abutting property owners "for the purposes of its incorporation" so long as the Spur was maintained and operated for railroad purposes.

The Spur structure was the familiar elevated roadway and rails supported by girders resting upon iron columns sunk into the earth (R. Ex. A-X, 337). The Spur was a one track line at the easterly end, two tracks in the middle and three tracks at the westerly end (R. Ex. A-X, 297) upon which the Manhattan Co. operated two trains consisting of two cars each during rush hours and of only one car at other hours. These trains had to operate simultaneously in opposite directions so as to pass between the stations at either end of the Spur, it being impossible for the two trains to stand at the same station (R. Ex. A-X, 298-9).

The assessment for benefits against this respondent's property is in the sum of $27,017.34 (R. 142), upon which amount interest is payable from May 7, 1932 (R. Ex. A-X, 89, 94). This respondent's property affected by the judgment in this proceeding consists of four parcels of real property described by lot, block and map numbers in its objections (R. 142). The actual locations of these four parcels are shown on the Benefit Maps attached to the final decree (R. 35, Ex. A-X, 1890). See Benefit Map No. 8 showing Block No. 1297, Lot 21, having a frontage of fifty feet on the north side of Forty-second Street between Lexington Avenue and Third Avenue and extending back to the middle of said block. This parcel is in Zone A. See also Benefit Map No. 6, showing Block No. 1277 and Lots 5 and 6, having an aggregate frontage of forty feet on the north side of Forty-second

Street between Madison Avenue and Fifth Avenue and extending back to the middle of said block. Said lots are in Zone C (R. Ex. A-X, 91). The remaining parcel is Lot 67½ in Block No. 1277 and is shown on the same Benefit Map immediately in the rear of Lots Nos. 6 and 7, having the following dimensions: 25 feet by 35 feet. Said lot 67½ is in Zone D (R. Ex. A-X, 91).

In view of the fact that the history of the proceedings is covered in the City's brief, we shall merely summarize the findings of the Trial Court on the retrial of the case. The Trial Court found that the claimants were entitled to no award for the Spur franchise, but were entitled to an award of $235 for the physical structure of the Spur conceded to be its scrap value and to $539,117.41 for the right to impair the abutting owners' easements of light, air and access (R. 340, 341; 141 Misc. at p. 572). The other item of $80,000 awarded for the cost of the reconstruction and alteration of the Elevated Station at East 42nd Street and Third Avenue will not be discussed for that item of award is not before the Court.

The final decree included the foregoing items of award in the aggregate sum of $619,352.41 with interest and costs in the sum of $1,014,905.52 (R. 85).

All parties appealed from the foregoing judgment to the Appellate Division which affirmed said judgment without opinion R. 388; 238 App. Div. 832) and thereafter upon cross appeals taken by all parties to the Court of Appeals said Court affirmed the judgment (R. 410; 265 N. Y. 170).

The claimants' evidence that their rights or so-called easements to impair the abutting property owners' easements of light, air and access were of the value of $3,600,000 (R. Ex. A-X, 854) is arrived at

by taking, at the time of the City's acquisition of the title to the Spur structure, the difference in the estimated values of the property abutting on the 42nd Street Spur before and after the removal of the spur structure—in other words, the amount of the increased value of said property resulting from the removal of the structure from 42nd Street (R. Ex. A-X, 864-5, 866).

The foregoing valuation of $3,600,000 is the claimants' estimated amount for which the Manhattan Co. could sell these so-called easements "separate and independent" of the railroad "in the open market" either to the City of New York or to abutting property owners (R. Ex. A-X, 858-9, 866).

Claimants' evidence shows that with respect to the greater part of the abutting property the easements were acquired by private settlement (R. 320-1, Claimants' Ex. C-X and D-X). It is shown (R. 319) by Claimants' Ex. B-X and their evidence (R. 236) that claimants paid only $175,199.99 for these so-called easements by virtue of judicial determinations and only $91,295 in settlement cases which latter, also covered past damages, making, including said damages, a total sum of $266,494.99 paid for said easements (see R. 319 and Claimants' Ex. B-X).

Summary of Argument.

We do not discuss in this brief claimants' alleged right to receive an award for the franchise of the Manhattan Co., which the courts below have found was valueless, nor their claim that they should have received a larger award for the Spur structure, which the courts below have found had only a junk value, for these valuations are findings or conclusions of fact predicated on other findings of fact which will, as we understand, be accepted as final by this Court.

But in any event there is no merit to the claimants' contention in this respect for their claim, as we understand it, is that the abutting owners might have been willing to pay the Manhattan Co. a considerable sum of money in order to acquire the Spur, not for the purpose of operating it, but for the purpose of abandoning its operation and removing the structure from the street on account of the fact that the presence of the Spur in the street impaired the value of the abutting property.

With respect to the award to the claimants for the extinguishment of these so-called easements or rights to impair easements of light, air and access of the owners of the property abutting on 42nd Street, we contend that the claimants in no event are aggrieved by the judgment of the court below, under which they were awarded $539,117.41 for the extinguishment of these so-called easements, for we respectfully submit that under well established principles of law they were not entitled to any award for their so-called easements.

We show in Point I below that these so-called easements were devoid of any value to the Manhattan Co. for the operation of the Spur was a financial burden to the Manhattan Co. and the Interborough Co. for it could be operated only at a large annual loss, and furthermore, the so-called easements were appurtenant to the Spur and were incapable of severance or transfer independently of the Spur, and upon the condemnation of the Spur and the removal of the structure from the street, the claimants' so-called easements or right to impair the abutting property owners' easements of light, air and access reverted to these property owners.

We maintain that claimants' contention that these so-called easements or rights should be valued sepa-

rately and apart from the Spur for purposes wholly foreign and disconnected with the Spur is manfestly unsound and wholly without merit. The Manhattan Co. acquired these rights only for the operation of the Spur in 42nd Street and could not have transferred these rights except as an integral part of the Spur itself which was without value other than a nominal junk value. The claimants contend in this connection that the Manhattan Co. might have transferred these rights or easements to the abutting property owners for the amounts which the removal of the Spur structure would have increased the value of their properties.

Plainly speaking the claimants are seeking an award for the so-called easements on a speculative nuisance value basis, of necessity predicated on the false postulate that the claimants could have removed the Spur structure piecemeal after dickering and bargaining with each of the abutting owners for the payment to the claimants of the nuisance value of the structure in the street.

We submit that the claimants were entitled to an award for the value, if any, of their property appropriated in the condemnation proceedings at the time said property was taken, but we contend that claimants' so-called easements had no value at that time. The law is well settled by an abundance of authority that when property is appropriated for a public purpose, in the assessment of damages *the question is not what has the taker gained but what has the owner lost,* and that the owner is not entitled to the cost of the property, which may have greatly increased or decreased since its purchase, but only to the value of the property at the time of the taking, and we claim as a matter of fact and of law in the instant case that these so-called easements had no value at the time the Spur was appropriated.

Argument.

POINT I.

The so-called easements or rights of the claimants to impair the easements of light, air and access of the abutting owners which were acquired for, and appertained only, to the operation of the Spur were extinguished upon the removal of the Spur, which was judicially determined to be not only no longer necessary and convenient for the public service, but an impediment and obstruction to the public use of the street, and any rights the claimants had to impair or encumber the abutting property owners' easements of light, air and access upon the removal of the Spur reverted to the said property owners who then held their easements of light, air and access in their full integrity, unimpaired and unencumbered by any easements or rights of the claimants, and claimants having received an award of $539,117.41 for the alleged "taking" of their so-called easements, are not aggrieved by the judgment of the Court below, for we submit that there is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements.

Before considering the character of the claimants' rights to impair these easements of the abutting owners, which rights of impairment are sometimes referred to as easements, it is well briefly to consider the property with which these so-called easements were connected or appurtenant to, that is, the Spur, and we distinctly do not mean that these so-called easements of the Manhattan Co. were of light, air and access for those easements, as we presently show, were appurtenant to the abutting property from which they were incapable of being dissevered. In other words the rights or easements of the Man-

hattan Co. did not consist of light, air and access but of the right of immunity or non-liability for impairing those easements which were appurtenant to the abutting property.

A. This court has held that "in cases coming from a state court we do not review questions of fact but accept the conclusion of the state tribunals as final". (*Chrisman* v. *Miller,* 197 U. S. 313, at p. 319, citing cases; see also *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, at p. 124; *Gleason* v. *White,* 199 U. S. 54, at p. 60.)

The Public Service Commission found, pursuant to proceedings taken prior to the removal of the Spur structure, that the Spur was no longer necessary and convenient to the public service and constituted an impediment and obstruction to public use of the street (R. Ex. A-X 1101).

Mr. Justice O'Malley at the first trial held that the Spur was not profitably operated (R. Ex. A-X; 126 Misc. at p. 895) and the Appellate Division distinctly stated on the first appeal that the cost of operation of the spur exceeded the yearly revenue received by many thousands of dollars and that the *removal of the Spur structure was a distinct and positive benefit to the claimants* (R. 299, 301, 305; 229 App. Div. at pp. 627, 628 and 629). The Court of Appeals confirmed the foregoing findings that the franchise to operate the Spur was worthless and that the structure had under the circumstances only a junk value (R. 414; 265 N. Y. at p. 182).

It should be borne in mind that the Manhattan Co. could not use the space occupied by the Spur structure for any other purpose, for it has been held that after acquiring the right to impair the easements

of light, air and access of abutting property owners, it had no right to add a third express track or substantially change the elevated structure in the street. (*Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; *Rothschild* v. *Interborough Rapid Transit Co.*, 162 App. Div. 532; *Auchincloss* v. *Met. El. R. Co.*, 69 App. Div. 63.)

The value of property, generally speaking, when appropriated is determined by its productiveness, that is, by the profits it brings to the owner (*Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312; *Northern Pac. Ry. Co.* v. *N. American Tel. Co.*, 230 Fed. (C. C. A. 8th Cir.) 347, at p. 352; *Oshkosh Water Works Co.* v. *Railroad Commission*, 161 Wisc. 122; 152 N. W. 859; *Clarion Turnpike & Bridge Co.* v. *Clarion County*, 172 Pa. 243, 33 Atl. 580; *Kennebec Water Dist.* v. *City of Waterville*, 97 Me. 185, 54 Atl. 6).

In *Monongahela Navigat'n Co.* v. *United States*, *supra*, the court said at page 328:

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."

Manifestly the Spur which was operated at an annual loss of many thousand of dollars was only a burden to the Manhattan Co. and the claimants sustained no damage by the appropriation of the Spur and the removal of the Spur structure.

B. The abutting owners' easements of light, air and access were by their very nature incapable of

being taken or acquired by the Manhattan Co. so as to become appurtenant to the Spur.

The courts have held that these easements were indissolubly annexed to the abutting land and incapable of distinct and separate ownership. (*Kernochan* v. *N. Y. E. R. R. Co., et al.*, 128 N. Y. 559; *Bohm et al.*, v. *M. E. R. Co., et al.*, 129 N. Y. 576; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618.)

In *Kernochan* v. *N. Y. E. R. R. Co., et al., supra,* the court said in referring to the easements of light, air and access, page 568:

> "The easements of an abutting owner, invaded, are appurtenant to his premises, and in the nature of things they are indissolubly annexed thereto until extinguished by release or otherwise. They are incapable of a distinct and separate ownership."

In *Bohm et al.* v. *M. E. R. Co., supra,* the court said, page 588:

> "It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion there is and can be no value in a given quantity of air, or space, or light in the public street except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air or access and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land."

Of course, by the erection of the Spur structure, there was a "taking" within the meaning of the state and federal constitutions by the Manhattan Co. of

property rights of the abutting owners by the trespass on their easements within the principles enunciated by the Court of Appeals. (*Story* v. *N. Y. Elevated R. R. Co.*, 90 N. Y. 122; *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, at p. 288.)

Though the impairment of the easement rights of the abutting owners constituted such a taking as to render the Manhattan Co. liable to the owners for the damages occasioned by such taking, the Manhattan Co. did not acquire the easements which it impaired. Pound, *Ch. J.*, in the instant case in this connection succinctly summarized the extent of the rights acquired by the Manhattan Co., stating, "* * * it is clear that the railroad *merely exhausted the right of the abutting owners to complain because a railroad was in the street and so trespassing on their property*" (R. 412; 265 N. Y. at p. 180).

These easements of light, air and access appurtenant to the abutting property, impaired by the Spur structure, again became perfect in the abutting owners and usable to their full extent upon the removal of the structure from the street. And this whether the structure was removed voluntarily or in proceedings *in invitum*.

The extinguishment of the Manhattan Co.'s right to impair the abutting owners' easements did not constitute a "taking" of the property within the meaning of the constitution, for destruction or injury to property is frequently accomplished without a taking in the constitutional sense. (*Omnia Commercial Co. Inc.* v. *United States*, 261 U. S. 502; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, at p. 94; *Puget Sound Co.* v. *Seattle*, 291 U. S. 619; *C. B. & Q. Railway Co.* v. *Drainage Comm'rs*, 200 U.

S. 561; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United Railroad* v. *San Francisco*, 239 Fed. 987, 997.)

In *Omnia Commercial Co. Inc.* v. *United States*, *supra*, the court said, page 508:

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

In *Puget Sound Co.* v. *Seattle*, *supra*, the court said, page 626:

> "The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 400; *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 276, nor can it relieve property of congenital defects, *Madera Water Works* v. *Madera*, *supra*, 456."

In *C. B. & Q. Railway* v. *Drainage Comm'rs*, *supra*, the court held that the railway company was not entitled to any compensation for the removing of a bridge lawfully constructed and for reconstructing a larger bridge to afford a wider channel as directed by the Drainage Commissioners. The court held that there was no taking of the railway's property within the meaning of the constitution, stating, after discussing similar cases, page 584:

> "* * * in each of those cases, this court recog-

> nized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation."

In the instant case the appropriation of the Spur not only did not cause the claimants any damage but was, as the Appellate Division found, "a benefit to the claimants" (R. 288; 229 App. Div. at p. 620).

C. The easements of light, air and access upon the removal of the Spur structure pursuant to the condemnation decree reverted in their full integrity to the abutting property owners without in any manner being encumbered by the rights theretofore acquired by the Manhattan Co. to impair said easements, for the franchise to maintain the Spur *was limited to railroad purposes* (Laws 1875, Ch. 606).

This is true even if it be assumed that the Manhattan Co.'s rights to impair these easements be deemed easements to which the abutting owners' easements of light, air and access were servient. (*Harris, et al.* v. *Elliot,* 10 Peters (U. S.) 25 at pp. 55 & 56; *Heard* v. *City of Brooklyn,* 60 N. Y. 242; *Strong, et al.* v. *City of Brooklyn,* 68 N. Y. 1; *Wash. Cemetery* v. *P. P. & C. I. R. R. Co.,* 68 N. Y. 591; *Crouch* v. *State of New York,* 218 App. Div. 356; *Scheer* v. *L. I. R. R. Co.,* 127 App. Div. 267; *Brooklyn, Queens Co., et al.* v. *Bird,* 76 Misc. 62, aff'd 152 App. Div. 932; *Bell* v. *Mattoon Water Works etc. Co.,* 245 Ill. 544; 19 Ann. Cas. 153.)

In *Heard* v. *City of Brooklyn, supra,* a railroad company had obtained from the Legislature authority to appropriate lands for railroad purposes and in the exercise thereof had acquired a strip of land adjoining a certain avenue. Subsequently the defendant decided to widen the avenue and received from the railroad company a deed to so much of its right of way, stripped of the tracks, as was needed to bring the avenue to the desired width. The plaintiffs, as successors in interest to the parties from whom the railroad company had secured the right of way, brought ejectment proceedings and the Court of Appeals held that the complaint alleged a good cause of action. The court, in referring to the condemnation proceedings taken pursuant to the statute under which the railroad company was chartered, said, page 246:

> "* * * that company became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land."

The *Heard* case was before the court again under the title *Strong et al.* v. *City of Brooklyn, supra,* where the court affirmed the judgment of ejectment. The court there stated, page 11:

> "The city here seeks to keep up the proprietary interest once held by the railroad company in these lands. It will not do, as is done by the defendant, in one breath to say that by the conveyance from the railroad company, that proprietary interest has ceased, and the premises are now held only as a public street; and in another, we need not pay you as owner of the fee any compensation for

> taking your lands for use as a public street, for we have acquired the right to them which was in the railroad company, for which you have been paid."

The law is well summarized in *Crouch* v. *State of New York, supra,* where an easement over the plaintiff's property was acquired for railroad purposes by condemnation proceedings and thereafter appropriated by the state for canal purposes. The court in holding that upon the cessation of the use of the land for railroad purposes the title reverted to the plaintiff and that he was entitled to recover damages from the state, said, page 362:

> "If the owner of such an easement abandons the property, sells it or devotes it to some purpose foreign to that for which it was acquired, *or if it is condemned or appropriated for a new public purpose,* the owner of the reversion may assert his right to possession or claim compensation. (*Heard* v. *City of Brooklyn, supra; Strong* v. *City of Brooklyn, supra; Hooker* v. *Utica & M. T. R. Co.,* 12 Wend. 371; *People* v. *Lawrence,* 54 Barb. 589, 619; *Porter* v. *International Bridge Co.,* 200 N. Y. 234; *Mechanicville & Ft. Edward R. R. Co.,* v. *Fitchburg R. R. Co.,* 103 Misc. 46; affd., 190 App. Div. 887; *Harris* v. *Elliott,* 10 Pet. 25; *Newton* v. *Manufacturers' R. Co.,* 115 Fed. 781, 786; 2 Nichols Em. Dom. (2d ed.) 1418.)" (Italics ours.)

D. It will be noted that the claimants' contention with respect to the inadequacy of the award for the Manhattan Co.'s so-called easements, that is, the right to impair with impunity the easements of light, air and access of abutting property owners, is based on the alleged rights of the claimants to continue to operate at a heavy financial loss to them-

selves the Spur, which had been judicially determined to be no longer necessary and convenient to the public service and to constitute an impediment and obstruction to the public use of the street. *What value could such rights have? They manifestly could not exist without the Spur or survive the removal of the Spur structure.* The claimants' position clearly is that the Spur had a "nuisance value" for which they are entitled to be compensated, though doubtless they will disown the phrase and deny its appropriateness. That this is in reality their claim cannot be gainsaid *for the claimants presented no evidence of the value of these rights possessed by them to impair the abutters' easements as annexed to the Spur as a going concern operated at a loss, but only adduced evidence tending to show that the properties abutting the Spur increased in value at least $3,600,000* upon the removal of the Spur structure from the street, which amount claimants maintained is the value of the rights they had acquired to impair the easements of the abutting property owners (R. Ex. A-X, 854, 864-6). The claimants paid something less than $266,494.99 for these rights (R. 319, Ex. B-X).

They predicate the valuation of these rights not on their actual value to the Manhattan Co., which was *nil*, but on the amount of the nuisance damage the Spur structure was presumed to be causing the abutting property owners—that is, the estimated amount the abutting property owners would pay, or, rather, the amount the claimants believe these owners should have been willing to pay to extinguish claimants' rights to impair their easements by the maintenance of the Spur structure in front of their properties (R. Ex. A-X 858-9, 866).

It is perfectly obvious that there is no merit to the claim made by these claimants that they should be paid a huge sum of money, or any other sum, for

rights which had no value whatsoever to the Manhattan Co., for under the claimants' theory the value of these rights depended principally, if not entirely, upon the enterprise and initiative of the abutting property owners or the lack of it; that is to say, in either developing their property or letting it remain unimproved. Under claimants' theory of damage, if an owner left his property unimproved there would be little or no value in claimants' so called easements in relation to that property even if the Spur were operated at a profit, while if another owner developed and improved his property by erecting a valuable building thereon the claimants' rights in relation to this property would become very valuable, not because the Manhattan Co. did anything to improve the value of those rights or contribute to the value of this improved property, for it would have done no more for that property than it did for the property left idle and unimproved, but because the owner improved his property despite the existence of the Spur structure in the street. We respectfully submit the statement of claimants' theory of valuation of the rights to impair the easements of abutting property owners carries its own refutation.

As stated by Judge Hough in *Consolidated Gas Co.* v. *City of New York,* 157 Fed. 849, "nuisance value" is so obviously illegitimate as to require no discussion. He stated in that case, page 874:

> "I can imagine no more than three ways in which the value of a franchise can be stated. It is valuable; (1) Because it authorizes the gainful use of private property in a particular manner; (2) because once obtained it is often difficult or impossible to get another like it; and (3) *because it may be used to injure or*

> *hinder another enterprise, although itself conferring or securing nothing of value.* The third method of statement has been accurately, though colloquially, described as 'nuisance value' *and is so obviously illegitimate as to require no discussion.*" (Italics ours.)

E. The Manhattan Co.'s franchise to construct and maintain the Spur, together with the so-called easements to impair the abutting owners' easements of light, air and access, in effect, became extinguished upon the judicial determinations that the Spur structure was no longer necessary and convenient for the public service and constituted an impediment and obstruction to the public use of the street and that the Spur was operating at a loss of many thousands of dollars annually. (*Southern Ry. Co.* v. *City of Memphis,* 97 Fed. (C. C. A. 6th Cir.) 819; *In re Oak Leaf Coal Co.,* 225 Fed. 126; *Grafton* v. *Moir,* 130 N. Y. 465, at p. 470; *Central Wharf* v. *Indian Wharf,* 123 Mass. 567; *Atl. & W. C. R. Co.* v. *Way et al.,* 172 N. C. 774, 90 S. E. 937; *Chicago & N. Y. Ry. Co.* v. *Sioux City Stockyards,* 176 Iowa 659, 158 N. W. 769; *California & N. R. Co.* v. *McCartney,* 104 Cal. 616, 38 Pac. 448; 19 C. J. 954, Sec. 172 (Easements).)

The law is summarized in 9 R. C. L. page 815 (Easements):

> "71. *Completion of Purpose.*—When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted the easement is extinguished. Hence if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified user ceases."

In *Southern Ry. Co.* v. *City of Memphis, supra,* the Circuit Court of Appeals affirmed a judgment of the lower court denying an injunction to restrain the defendant city from removing plaintiff's railroad tracks from a city street and dismissed plaintiff's bill. The city franchise to the plaintiff provided that the cars on the line in question should be "drawn by horse or other animal power". The plaintiff found after it had laid its tracks in the street that owing to the grade the cars could not be operated with horse or other animal power as required by the franchise. The city, to protect the residential section through which the line passed, refused to permit the plaintiff, except for a short time, to operate the cars by dummy steam engines. Plaintiff admitted that the franchise restricted to animal power was valueless to it and that the track was maintained solely with the hope that the city might at some time consent to the use of some other power. The court said at page 821:

> "If, under such circumstances, the right to continue the maintenance of the track upon the street exists, it is a barren right to maintain an obstruction in the public street which is of no possible beneficial use to the grantee, and which is only maintained in the hope that the terms upon which the easement was originally granted may in some future time be so modified as to make its operation practicable."

Page 822:

> "Without regard to any question of abandonment by nonuser, the impossibility of enjoying the easement granted operates to bring it to an end through the inherent limitation of the grant itself. It is like an easement granted

for a particular purpose. *If that purpose cease to exist,* or its enjoyment become impossible, the grant is at an end. Thus, where there was a reservation of a right of way over flats appurtenant to uplands, for water craft, to and from a dock or wharf, the easement was held to be extinguished by the subsequent construction by the city of a public street between the plaintiff's upland and the dock, which made access to the dock and deep water impossible. *Mussey* v. *Proprietors,* 41 Me. 34. In *Manure Co.* v. *Donald,* 4 Hurl. & N. 8, an easement to take water for the use of a canal was held to cease when the canal was converted into a railroad. Pollock, *C. B.,* in that case stated the principle thus:

> 'If an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement.' "

The court, after referring to other authorities, said, page 823:

> "It matters little, in principle, whether the easement as originally granted was incapable of enjoyment for the purposes intended, or whether by change in conditions its exercise became impossible. The track, as a mere accessory to the principal right, is incapable of enjoyment, *is an obstruction to the public street,* and equity will not interfere to prevent its removal." (Italics ours.)

The principles enunciated in the *Southern Ry. Co.* case are clearly applicable to the instant case for here it has been adjudicated that the purpose of the franchise to operate the Spur has ceased to exist; that the Spur is no longer necessary and convenient

for the public service and that the structure constitutes an impediment and obstruction to the public use of the street (R. Ex. A-X, 1101). In this connection it should be borne in mind that the Manhattan Co.'s franchise was granted on a then existing necessity and convenience to the public (Laws 1875, Ch. 606, Sec. 4, and R. Ex. A-X, 1242 *et seq.*, 1877).

F. When property is appropriated for public use, in determining the amount of damages *the question is not what has the taker gained, but what has the owner lost.* (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, at p. 76.)

In the *Boston Chamber of Commerce* case the City sought to acquire title to land for street purposes. The title to the land in question was in the Chamber of Commerce, subject, however, to an easement of light and air in the Central Wharf Co., an adjoining owner. The court held that the claimants in that case were not entitled to have their damages assessed in a lump sum and that the City could not be required "to pay for a loss of theoretical creation, suffered by no one in fact." Holmes, *J.*, writing for the court, said in referring to the Fourteenth Amendment of the federal constitution, page 195:

> "It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. *And the question is what has the owner lost, not what has the taker gained.*" (Italics ours.)

As we have hereinabove shown, the claimants' so-called easements had no value to them upon the condemnation and removal of the Spur. Manifestly the foregoing case clearly establishes that there is no basis in fact or law for the claimants' contention that they should be entitled to recover the amount their witnesses testified that the abutting owners should be willing to pay for the removal of the Spur structure and the extinguishment of the rights of the Manhattan Co. to impair their easements.

It is well settled by numerous decisions of this court that just compensation to an owner when property is appropriated is *the value* of the property taken *at the time* of the taking. (*Olson* v. *United States,* 292 U. S. 246, 255; *Vogelstein & Co.* v. *United States,* 262 U. S. 337, at p. 340; *United States* v. *New River Collieries Co.,* 262 U. S. 341, at p. 344; *Jacobs* v. *United States,* 290 U. S. 13; *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312, at p. 341; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, at pp. 80-81; *United States* v. *Rogers,* 255 U. S. 163, at p. 169.)

G. The claimants are entitled only to the fair market value of the property appropriated "for all available uses and purposes", and are not entitled to be paid for any speculative value, nor are they entitled to any compensation for any element resulting subsequently to or because of the taking. (*United States* v. *Chandler-Dunbar Co., supra; Olson* v. *United States, supra.*)

The claimants' theory of damage for the extinguishment of their so-called easements or rights is clearly predicated upon the element resulting because of the extinguishment of those easements, that is, the enhancement in the value of the abutting property.

The foregoing authorities clearly show that the claimants are not entitled to any damage on this basis.

In *United States* v. *Chandler-Dunbar Co., supra,* the court said, page 80:

> "But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." (Citing numerous authorities.)

In *Olson* v. *United States, supra,* the court said, page 255:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined."

And at page 256:

> *"But the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking."*

And at page 257:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value —a thing to be condemned in business transactions as well as in judicial ascertainment of truth. (*Cf. Minnesota Rate Cases, supra,* p. 452. *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S.

133, 152. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 319.)." (Italics ours.)

Under the terms of the 999-year lease between the Interborough Co. and the Manhattan Co. the former agrees to pay, and guarantees the holders of the stock of the Manhattan Co. 7% on their stock holdings. Neither the Manhattan Co. nor its stockholders under the lease are entitled to receive any percentage or part of the Manhattan Co.'s earnings or receipts as such (R. Ex. A-X 1150-1): If traffic shall be diverted from the Manhatan Co. to the Interborough Co., as the claimants contend, the former would suffer no loss. Neither the remote possibility that circumstances might arise for the cancellation of the lease nor that the traffic on the Spur might have increased in the future is a ground for awarding damages to the claimants as shown by the law enunciated in *Olson* v. *United States, supra.*

II. The courts below clearly erred in awarding the claimants $539,117.41 which amount is based upon the estimated original cost of the Manhattan Co.'s rights to impair the easements computed upon the values judicially determined at the time the rights were acquired, for the owner of property, upon its appropriation, is not entitled to the cost of the property but only to the value at the time of the taking (*Olson* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, at p. 123), and it is quite immaterial that in the instant case the Manhattan Co. may have paid taxes on its so-called easements.

In *Olson* v. *United States, supra,* the court in holding that the owner of the property upon its appropriation was entitled to the market value of the

property at the time of the taking contemporaneously paid in money, said, page 255:

> *"It may be more or less than the owner's investment.* He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him.
>
> * * * He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. *It is the property and not the cost of it that is safeguarded by state and federal constitutions. Minnesota Rate Cases,* 230 U. S. 352, 454." (Italics ours.)

Conclusion.

In conclusion we submit that damages to be awarded in a condemnation proceeding cannot be predicated on any element resulting from the taking.

In the case at bar petitioners' theory that abutting property owners would pay a certain amount to take down the elevated structure, and that the Manhattan Co. could have agreed to such removal for a consideration, presupposes the condemnation, for until that was started following the finding of the Public Service Commission as to public convenience no longer requiring the maintenance of the Spur structure, the Manhattan Co. was under obligation to run the elevated railway, and failure to do so woud *ipso facto* result in loss of its right to further obstruct light, air and access of the abutting property owners. Therefore, clearly prior to the condemnation the Manhattan Co. had nothing of value to sell, because, as shown above, the rights which the Manhattan Co. acquired to obstruct light, air and access were only for the

purpose of running an elevated railroad, with a right of reversion in the owners of the abutting property of the right to obstruct their light, air and access in the operation of the elevated railway.

Moreover, the payments made by the Manhattan Company when it acquired the right to obstruct the light, air and access of abutting property owners, was not for a perpetual right to obstruct light, air and access with an elevated structure, but only during the operation of the elevated railroad, and by the structure then erected, and not even by an elevated third track addition.

To have acquired a right such as the Manhattan Company claims it owned at the time of the condemnation (had it had the right to acquire such right, which of course it never had) it would undoubtedly have had to acquire title to the abutting property, so that it is now seeking to enrich itself by claiming value based on a more extensive right than it acquired and paid for.

Furthermore, the evidence offered to sustain its theory (which petitioners incorrectly refer to in many places in their brief as proven facts or uncontroverted or undisputed facts) is admittedly based on no consideration of the right to obstruct light, air and access, being coupled with an obligation to operate an elevated railway (R. Ex. A-X, pp. 858-60, 866). There is, therefore, no evidence in the case of what the only rights which the Manhattan Company had, which it could assign, could have been sold for. This was manifestly due to the fact that as the Spur was being operated at a loss, no one would pay anything for the right to obstruct light, air, and access for the sole purpose of running an elevated railway.

Had the Manhattan Company possessed the right to maintain an elevated structure, disassociated with

the operation of an elevated railroad, as for instance to display advertising signs or to accommodate traffic, such as a speedway, and the right to retain the elevated structure after operation of the Spur should cease, there might be some basis for the arguments petitioners make, but unfortunately for petitioners, the nature of the rights acquired by the Manhattan Co. were limited to rights incident to the operation of an elevated railway, and have been so construed by the New York courts, and as shown above, such construction is not reviewable by this court.

The judgment should be affirmed, with costs to the respondents.

Respectfully submitted,

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